

TETLIN NATIVE CORP.

IBLA 82-1145  
ANCAB VLS 80-47

Decided September 17, 1986

Cross-appeals from a decision by Administrative Law Judge E. Kendall Clarke, determining the boundaries of the former Tetlin Indian Reserve in Alaska. F-20518 (formerly ANCAB VLS 80-47).

Affirmed as modified in part; reversed in part.

1. Alaska National Interest Lands Conservation Act: Native Reserves: Boundaries -- Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance -- Alaska Native Claims Settlement Act: Appeals: Generally -- Alaska Native Claims Settlement Act: Native Land Selections: Native Reserves -- Appeals -- Indians: Alaska Natives: Generally -- Rules of Practice: Appeals: Generally

Where a native village corporation elected to take a reserve as it existed and was described as of Dec. 18, 1971, pursuant to sec. 1437 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1641 (1982), and the boundaries of the reserve as described on Dec. 18, 1971, can be determined, such election is deemed to be a complete satisfaction of its entitlement.

APPEARANCES: Frederick H. Boness, Esq., Anchorage, Alaska, for Tetlin Native Corporation; Barbara Miracle, Esq., Assistant Attorney General, Anchorage, Alaska, for the State of Alaska; Keith A. Goltz, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

This appeal concerns the boundaries of the former Tetlin Indian Reserve (reserve) in Alaska which was created on June 10, 1930, by Executive Order (EO) No. 5365.

On December 18, 1971, Congress enacted section 19 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1618 (1982), which extinguished reserves set aside by Executive Order for Native use in Alaska and gave Native village corporations located on such reserves the option of taking title to both the surface and subsurface estates of their former reserves.

By making that election a Native village corporation would forego any rights to a land selection under ANCSA and certain monetary benefits. In 1973, the Tetlin Native Corporation (Tetlin), a Native village corporation, elected to receive title to lands withdrawn by EO No. 5365. On September 30, 1980, the Bureau of Land Management (BLM) issued a decision to convey to Tetlin some of the lands within the reserve. Tetlin appealed that decision to the Alaska Native Claims Appeal Board (ANCAB), contending that BLM had incorrectly described the boundaries of the reserve as created by EO No. 5365, and, thus, erroneously excluded several parcels, comprising approximately 60,000 acres, from the proposed conveyance.

During the pendency of this appeal, Congress enacted section 1437(b)(3) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1641(b)(3) (1982), on December 2, 1980. That statutory provision provides that, subject to valid existing rights,

[T]here is hereby conveyed to and vested in [an eligible Native village corporation] which \* \* \* has elected to \* \* \* acquire title to any estate pursuant to section 19(b) of [ANCSA, supra] \* \* \* all of the right, title, and interest of the United States in and to the estates in a reserve, as such reserve existed on December 18, 1971, which was set aside for the use or benefit of the stockholders or members of such Corporation before December 18, 1971.

43 U.S.C. § 1641(b)(3) (1982). Section 1437(a) of ANILCA, 43 U.S.C. § 1641(a) (1982), provides that the provisions of section 1437 will be applicable only where an eligible Native village corporation files a document with the Secretary of the Interior "setting forth its election to receive conveyance pursuant to this section" within 180 days after December 2, 1980.

On May 18, 1981, Tetlin filed the necessary document electing to receive the immediate legislative conveyance of its reserve pursuant to section 1437(b)(3) of ANILCA. Subsequently, BLM issued a patent to Tetlin but excluded various parcels claimed by Tetlin, including parcels B and D which are disputed herein. By exercising its option, Tetlin received title to 743,159.22 acres. 1/

---

1/ That acreage is considerably more than Tetlin would have been entitled to had it not elected to receive the reserve under section 19 of ANCSA, supra. With 125 members, Tetlin would have been entitled, as a Native village corporation under ANCSA, to 92,160 acres and additional acreage allocated by the regional corporation on an equitable basis. 43 U.S.C. § 1613(a) (1982). The acquired acreage is also substantially more than acreage determinations based on the original "sketch map" of the reserve (U.S. Exh. I-F). On Oct. 25, 1930, Thomas A. Havell, Acting Commissioner of the General Land Office, computed the reserve to be "approximately 640 square miles" based on the "topographical reconnaissance map of the Upper Tanana region of Alaska dated 1922 on which the boundary description - the boundary of the reserve was delineated in pencil" (Tr. 365; see State Exh. SA-8 at 106, 108). At the hearing, this

In Tetlin Native Corp., 7 ANCAB 132, 89 I.D. 303 (1982), decided June 18, 1982, ANCAB 2/ granted Tetlin's motion for an evidentiary hearing to determine the boundaries of the former reserve.

An evidentiary hearing was held before Administrative Law Judge E. Kendall Clarke (Judge) on August 22-23, 1983, in Tok, Alaska, and on October 24-November 1, 1983, in Anchorage, Alaska. On August 31, 1984, the Judge issued his decision on the boundaries of the former reserve as described in EO No. 5365, concluding in part that BLM had incorrectly excluded parcel D from the proposed conveyance under section 19 of ANCSA, but had correctly excluded parcel B.

The reserve is described as follows in EO No. 5365:

Beginning at the mouth of Porcupine Creek, tributary to the Tanana from the north; thence running in southwesterly direction to the crossing of the old trail on Tok River; thence following natural divide between tributaries of the Tetlin lakes and the tributary to the Little Tok River to head of Bear Creek; thence around head of Bear Creek following east bank of Kalutna River to the mouth; thence in northeasterly direction to head of tributaries of Ladue Creek; thence following divide between the tributaries to the Tanana and tributaries to Ladue Creek to head of southernmost tributaries of east fork of Porcupine Creek; and then to place of beginning. [Emphasis added.]

Parcel B consists of 56,754 acres on the western boundary of the reserve. The dispute as to this parcel concerns the location of "the crossing of the old trail on Tok River." BLM surveyed a crossing referred to in the Judge's decision as the crossing of the "17 mile trail." According to Tetlin, the survey line should have been drawn further southwest at the crossing of the "Eagle Trail." The Judge found that the old trail crossing on Tok River was the 17-mile trail crossing surveyed by BLM.

Parcel D consists of 3,865 acres on the northeast boundary of the reserve. The point in conflict is the location of the "head of southernmost

---

fn. 1 (continued)

area was calculated to be 409,600 acres. A computer computation of the acreage was 411,431 acres (Tr. 571-73). In early July 1930, E. W. Sawyer, the Secretary of the Interior's Executive Assistant for Alaskan Affairs, who had participated in the May 1930 meeting at which the reserve was originally considered, announced in Juneau that the withdrawal affected "625 square miles" (Tr. 364; see State Exhs. SA-8 at 102, and SA-25; see also Tr. 1028, State Exh. SA-8 at 149). The difference between the estimates of the original acreage in the reserve and the acreage actually patented is a result of the official survey of the southern boundary which resulted in the increase of over 330,000 acres.

2/ By Secretarial Order No. 3078 (Apr. 29, 1982), the Secretary abolished ANCAB and transferred its functions to the Interior Board of Land Appeals, effective June 30, 1982.

tributaries of east fork of Porcupine Creek." Tetlin contended, and the Judge found, that the survey line should have been drawn to a 3,425-foot peak adjacent to the southernmost tributary of the east fork of Porcupine Creek.

On appeal before this Board, Tetlin challenged the Judge's conclusion on parcel B. The State of Alaska and BLM have filed answering briefs supporting the Judge's conclusion on parcel B, but they have independently contested his conclusion on parcel D. Tetlin has filed an answering brief supporting the Judge's determination on parcel D.

Tetlin presents two arguments on appeal. The first is that the Judge erred in not interpreting EO No. 5365 according to principles of construction applicable to Indian treaties and legislation. The principle of construction referred to "is that the wording of treaties and statutes ratifying agreements with Indians is not to be construed to their prejudice." Antoine v. Washington, 420 U.S. 194, 199 (1974). Thus, it is Tetlin's position that EO No. 5365 should not be interpreted in a manner which would deprive it of the lands at issue. Tetlin's second argument is that the evidence shows the Eagle Trail crossing to be the correct survey call for the western boundary.

Tetlin cites Cape Fox Corp. v. United States, 4 Cl. Ct. 223 (1983), and Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977), inter alia, in support of its position that EO No. 5365, if ambiguous, should be construed favorably to the Natives. It also cites Northern Pacific R.R. v. United States, 227 U.S. 355 (1913), wherein the Court was called upon to determine the boundaries of the Yakima Indian reservation from a description in an 1859 treaty and two inconsistent surveys. According to Tetlin, the Northern Pacific Court "expressly rejected the argument that deference should be accorded the Land Department's interpretation" of where the boundary should run (Statement of Reasons (SOR) at 7). Tetlin quotes the following statement of principle from the Northern Pacific opinion:

It must be borne in mind that the Indians had the primary right. The rights the Government has are derived through the cession from the Indians. If the Government may control the cession and control the survey and by the action of its agents foreclose inquiry or determine it, an easy means of rapacity is afforded, much quieter but as effectual as fraud.

Northern Pacific R.R. v. United States, supra at 366.

However, even assuming that EO No. 5365 is itself ambiguous, the preponderance of the evidence extrinsic to that document does not support Tetlin's position regarding the extent of the reserve intended by the EO.

The cases cited by Tetlin are also inapposite. In Cape Fox, the court noted that while there exists a general trust relationship between the United States and the Indian people, the existence of that relationship does not resolve the scope of the Government's obligations. The court refused to find that ANCSA created a fiduciary relationship between a Native village corporation and the Forest Service regarding management of land selected by the

corporation prior to conveyance. In Alaska Public Easement Defense Fund, several interpretations of section 17(b) of ANCSA, 43 U.S.C. 1616(b) (1982), which provided for the reservation of public easements across land conveyed to Native corporations, were at issue. Because the legislative history on the provision was unambiguous, the court found it unnecessary to construe the statute in favor of the Natives. In Northern Pacific, the court did apply the rule of construction urged here by Tetlin, but it did not, as Tetlin alleges, refuse to accord deference to the Land Department's interpretation:

On the contrary, the question must be examined and decided with due regard to the entire situation, keeping in mind the action of the department as an element to be considered and applying the rule of the cases that it should not be disturbed except for reasons that are clear and convincing, assuming, without deciding, that the rule applies to a case in which the Government is proceeding in the right of the Indians.

Northern Pacific R.R. v. United States, *supra* at 366.

Also, while the purpose of ANCSA is to settle Native land claims fairly and expeditiously, it must be remembered that the Secretary, under ANCSA, acts as a quasi-judicial officer whose trust responsibility does not require him to abandon his role as a neutral, impartial, and disinterested decisionmaker. Congress did not intend for all issues to be decided in favor of the Natives pressing a claim regardless of the underlying situation. This is particularly true where, as here, the interest of Tetlin competes with the interest of other Natives and with that of the public, to whom the Secretary also has a solemn responsibility. See Koniag, Inc. v. Kleppe, 405 F. Supp. 1360, 1373 (D.D.C. 1975), *aff'd in part* and *rev'd in part*, Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir.), *cert. denied*, 439 U.S. 1052 (1978).

BLM contends that parcel B was properly excluded from the reserve, and argues that the point in question, defining the northeastern boundary, was reasonably surveyed. It asserts that there is no clear proof that the survey as to parcel D is either fraudulent or grossly erroneous.

BLM also points out that Tetlin opted to receive conveyance of the reserve pursuant to ANILCA, section 1437(b)(3), and argues that Tetlin must take the reserve as it was delineated on BLM's official records on December 18, 1971. BLM cites the testimony of Realty Specialist Linda Resseguie who testified that on December 18, 1971, official records indicated parcel D as being outside the reserve boundaries, and that the terms of conveyance to Tetlin were governed by the perimeter of survey No. 2547 as shown on United States exhibit I-M (Tr. 1136, 1142). Tetlin argues that the extent of its reserve as it existed on December 18, 1971, must be determined by construction of EO No. 5365. The State of Alaska argues that BLM surveys of parcels B and D reflect the boundaries of the reserve intended by the drafters of the Executive Order.

We find it unnecessary to decide this case on the basis of whether the reserve as described in EO No. 5365, includes parcels B and D in light of Tetlin's election under section 1437(a) of ANILCA to receive immediate conveyance of its reserve pursuant to section 1437(b)(3) of ANILCA. We conclude that Tetlin's election under ANILCA constituted a complete satisfaction of its entitlement under section 19 of ANCSA and that the land subject to conveyance under ANILCA did not include parcels B or D.

[1] Section 1437(b)(3) of ANILCA appears in both the House and Senate versions of ANILCA which were considered immediately prior to passage of that Act. In identical language, the House and Senate committees, which reported on the respective bills, stated that the general purpose of the title, containing the provision permitting Native village corporations to elect to obtain conveyance of their reserves, was to "[expedite] conveyance of Federal lands to Alaska Natives \* \* \* so as to fulfill the land grants made under the Alaska Native Claims Settlement Act." H.R. Rep. No. 97, 96th Cong., 1st Sess. 136 (1979); S. Rep. No. 413, 96th Cong., 1st Sess. 128, reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5072 (emphasis added). The need to expedite conveyances under ANCSA was pointed out by the House committee, observing that Alaska Natives had "received less than one-eighth of the 44 million acres they were granted in 1971." H.R. Rep. No. 97, 96th Cong., 1st Sess. 140 (1979). It is obvious from reading the legislative history of ANILCA that in enacting section 1437(b)(3) and similar provisions Congress was concerned with finally resolving in an expeditious manner the question of the entitlement of Native corporations under ANCSA, which had not been resolved in the intervening years since enactment of ANCSA. Thus, section 1437(b)(3) was an effort by Congress to fulfill the promise of ANCSA that the settlement of Alaska Native land claims would be "accomplished rapidly." 43 U.S.C. § 1601(b) (1982); see S. Rep. No. 413, 96th Cong., 1st Sess. 236, reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5180. In particular, while a Native village corporation had to elect to obtain conveyance of its reserve, title to that land was "deemed to have passed on the date of the filing of a document of election \* \* \* notwithstanding any delay in the issuance of the interim conveyances or patents." 43 U.S.C. § 1641(c) (1982). The latter documents were to be issued "as soon as possible after enactment of this legislation." H.R. Rep. No. 97, 96th Cong., 1st Sess. 290 (1979).

Despite the legislative conveyance of the reserve effected by section 1437(b)(3) of ANILCA, Tetlin argues that it can continue to litigate the question of the extent of its reserve. Indeed, this was the position taken by ANCAB in its decision in Tetlin Native Corp., supra at 306. Such a position, however, is inimical to the clear purpose of section 1437(b)(3) of ANILCA that it "fulfill" the entitlement of Tetlin under ANCSA to lands within its reserve. Moreover, it perpetuates a controversy which section 1437(b)(3) of ANILCA was intended to expeditiously resolve. In addition, the argument that Tetlin could elect to obtain legislative conveyance of the reserve as it existed on December 18, 1971, and continue to litigate its entitlement, suggests that Congress intended no real election. Tetlin would be foregoing nothing, by its electing to obtain the conveyance, if it could

continue to seek additional lands under the reserve. Construing the statute in such a fashion makes the provision for an election illusory. Had Congress simply intended to convey the undisputed portion of land to Tetlin it would simply have directed such a conveyance to Tetlin, which, after all, had already elected to obtain conveyance of its reserve under section 19 of ANCSA without providing for an additional election. Indeed, Congress provided for nonelective legislative conveyances under other provisions of ANILCA. See 43 U.S.C. §§ 1634(a)(1), 1635(c) (1982). Congress, however, did not so provide in section 1437(b)(3). We conclude that Congress intended for Tetlin to choose between litigating the question of its entitlement under section 19 of ANCSA, with conveyance of land at some future point in time, or to accept an immediate legislative conveyance under section 1437(b)(3) of ANILCA, thereby foregoing litigation as to additional land as well as inquiry with respect to other lands within the reserve as it was described on December 18, 1971. See note 1 supra.

However, having said that section 1437(b)(3) of ANILCA, was intended as a complete satisfaction of Tetlin's entitlement under section 19 of ANCSA, we must determine what land was legislatively conveyed to Tetlin when it made its section 1437(a) election. Both the House and Senate committees stated that the statutory language was intended to convey "both the surface and sub-surface estate in the former Indian Reserve, as it existed and was described as of Dec. 18, 1971, to those Village corporations who elected under section 19(b) of the ANCSA to acquire its former reserve and forego all other land and monetary benefits of the ANCSA." H.R. Rep. No. 97, 96th Cong., 1st Sess. 290 (1979); S. Rep. No. 413, 96th Cong., 1st Sess. 279, reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5223 (emphasis added). This is the only legislative history directly on point and, in this light, we must construe the statutory phrase "as such reserve existed on December 18, 1971."

Before doing so, we will briefly set forth the history regarding the designation of the reserve. The lands proposed for inclusion in the reserve were initially described principally by place names. In developing the withdrawal, the boundaries were modified to tie them more to geographic features (Tr. 364). A "sketch map" (U.S. Exh. I-F), using a 1922 Geological Survey (Survey) topographic reconnaissance map of the area drawn to scale and depicting these modifications to the reserve, was prepared (Tr. 383-85). EO No. 5365 established and withdrew the reserve using the modified boundary description. As noted by the Judge at page 6 of his decision, "confusion and conflict" over the size of the reserve and the location of the boundaries was immediate. In 1940, the Bureau of Indian Affairs requested that the boundary of the reserve be surveyed. The General Land Office authorized a survey, and special instructions were prepared. Survey of various boundaries of the reserve proceeded piecemeal over the years with the final boundary survey (Survey No. 2547) being approved in 1979 (Tr. 1161; U.S. Exh. I-M). The disputed northeastern boundary, which serves to define parcel D, was established by two surveys - one approved in 1967, the other in 1970 (U.S. Exh. I-M). The point of the "head of southernmost tributaries of east fork of Porcupine Creek" was part of the 1970 approval. Id. Most of the disputed

western boundary, which serves to define parcel B, was established by the same two surveys and a survey approved in 1969. Id. The point of the old trail crossing and a portion of the western boundary were established by a survey approved in 1977. Id.

When Tetlin made its ANSCA election to obtain legislative conveyance of its reserve, only the survey of the western boundary had not been approved. A survey completed on the ground may be redone or changed prior to approval and is not a final survey (Tr. 1162). Surveys of the United States, after acceptance, are presumed to be correct and will not be disturbed except upon clear proof that they are fraudulent or grossly erroneous. Robert J. Wickenden, 73 IBLA 394 (1983). While, under ANSCA, Tetlin could have challenged the survey, thereby opening to question the correctness of the boundary determinations for the entire reserve, its subsequent election to obtain immediate conveyance of the former Indian Reserve, as it existed and was described as of December 18, 1971, pursuant to section 1437(a) of ANILCA foreclosed that possibility. Since on December 18, 1971 the official survey of the northeastern boundary of the reserve did not include parcel D, that parcel was not subject to conveyance pursuant to section 1437(a).

While it could be argued that in enacting section 1437(b)(3) of ANILCA Congress intended to convey only the reserve that had been subject to approved surveys, in which case parcel B would be subject to inclusion, it is clear from the statute and legislative history that survey approval was not the criterion to determine the extent of a legislative conveyance. There is no mention in section 1437(b)(3) or the legislative history that the land had to have been surveyed as of December 18, 1971. Compare with 43 U.S.C. §§ 1634(c), 1635(h)(3) and (4) (1982). If Congress intended the election under section 1437 to apply only where the land had been surveyed, it can be assumed that it would have precisely so provided. Rather the legislative history indicates that the land need only be described within the reserve as of December 18, 1971. As the record establishes that neither Parcel B nor Parcel D were within the reserve boundaries as depicted by BLM's records on the critical date, Tetlin's election under section 1437(b)(3) of ANILCA forecloses any claim it may have to such lands.

The above holding is, of course, dispositive of the entire appeal. However, inasmuch as the parties have expended considerable effort in arguing whether or not Parcel B should have been included in the reserve, we will examine the evidence on this point, even though it is no longer deemed controlling as to the disposition of the appeal. Our conclusion, for reasons set forth below, is that even if Tetlin's ANILCA election had not foreclosed further litigation as to the boundaries of the reserve, the evidence establishes that Parcel B was properly excluded.

Much of the confusion concerning the reserve's western boundary stems from numerous maps and other documents describing that boundary. The confusion began with the 1922 Survey topographic reconnaissance map of the Upper Tanana Valley region (U.S. Exh. I-F). According to two historians who testified, the map was altered after 1930; erasures were made, new lines were drawn to conform more closely to geographic features rather than place names, and the new boundary was described in EO No. 5365 (Tr. 567-68, 1007-08).



Thomas E. Taylor, a Survey cartographer, stated that because of a lack of modern technology, the 1922 map contained an east-west error of several thousand feet. In addition, the map indicates uncertainty of topography by areas being left blank or being indicated by dashed lines (Tr. 1055-60). In view of the following errors, the Judge found the reliability of this map highly questionable:

The Kalukna River is shown flowing directly into the Tanana River on the 1922 map, whereas modernly the Kalukna is shown as emptying into the Tetlin river, prior to the Tetlin emptying into the Tanana. The error is on the magnitude of some eight miles; that is, the Kalukna is depicted emptying into the Tanana River some eight miles east of where it should be depicted emptying into the Tetlin River. Furthermore, the description contained in the Executive Order language does not call for the boundary to follow the Kalukna, rather, the boundary is to follow the east bank of the Kalutna. The Kalutna is not shown on the 1922 map, and the boundary is drawn along the Kalukna. [Emphasis in original.]

Decision at 8-9.

The Judge found that the boundary as shown on the 1922 map could not be reconciled with the boundary as surveyed by BLM and that parties could offer no boundary description in which the 1922 map and the EO No. 5365 description were consistent with the reserve boundary as surveyed by BLM. He concluded that the 1922 map was of historical significance and that the boundary disputes could be resolved without resort thereto (Decision at 10).

As to parcel B, BLM's position that the survey point in question is located on the 17-mile trail and not the Eagle Trail, is traceable to the information provided by one John Hajdukovich. Hajdukovich lived in Alaska as a trapper, freighter, prospector, trader, and big game guide in the early years of this century. He was closely involved with the Tanana Valley Indians and served as a U.S. Commissioner from 1924 to 1936 (Decision at 3).

Hajdukovich set out to establish a boundary around the area traditionally used by the Tetlin Indians. Hajdukovich enlisted the assistance of Edward Mallinkrodt who arranged an appointment on March 9, 1930, with the Secretary of the Interior to discuss the reserve boundary. A written summary of the proposal for a reserve was presented at a subsequent meeting with E. W. Sawyer, the Secretary's Executive Assistant for Alaska Affairs, and L. A. Kalbach, the Acting Commissioner of the Office of Education. The proposal included a description which, after being modified to link boundaries to geographic features rather than place names, was essentially the description used in EO No. 5365. The phrase "thence running in southerly direction to the top of Tetlin Hill where old trail crossing is" became "thence running in southwesterly direction to the crossing of the old trail on Tok River" in EO No. 5365.

In 1941, George Parks prepared special survey instructions for the reserve. He used the 1922 map solely to locate a mountain peak on the northeastern border of the reserve. He felt that EO No. 5365 was so indefinite as to make surveying an impossibility without modification. General Land Office Assistant Commissioner Thomas Havell did not agree that the EO was indefinite and deleted that reference from the special instructions. In approving the survey instructions on August 16, 1941, Havell relied on the 1922 map to make certain modifications, and described, by latitude and longitude, the crossing of the old trail on Tok River, and confirmed the location of the peak on the northeastern boundary (U.S. Exh. 0-58; Decision at 7, 9).

However, uncertainty as to the boundary persisted in the 2 decades following 1941, because of adjacent land selections and withdrawals. By early 1950, BLM and the Bureau of Indian Affairs (BIA) wanted to make the Tok River to the Glenn Highway Bridge the western boundary of the reserve. In 1961, BIA attempted to obtain the views of the Indians on this proposed boundary alteration. Because the Indians were opposed, a trip was planned on the Tok River in the hope that some of the older Indians could pinpoint the old trail crossing (Tetlin Exhs. GG-QQ,HHH; Decision at 10-11). No such trip was ever made.

On the basis of discussions between BLM officials and John Hajdukovich, BLM prepared a detailed analysis of the reserve boundary question. BLM Land Examiner Douglas Jones, who prepared the report, believed the Survey map showing the boundary going to the Little Tok River to be in error. Jones testified to meeting with Hajdukovich, then 83 years old in 1962 (Tr. 842-46). According to Jones, Hajdukovich described the crossing and identified it on an aerial photograph. Jones' report states in part as follows:

Mr. Hajdukovich stated that he had prepared two original maps noting the boundaries of the reserve and believed that they were sent to the G.L.O. [General Land Office]. He submitted that the original description intended that the first course of the boundary was to have terminated at the crossing of the Tetlin Trail -- not the Eagle Trail as has been commonly supposed in more recent years. Further evidence that the "old trail" specified in the Executive Order was the Tetlin Trail may be found in the Special Instructions for the survey of the Tetlin Reserve which was designated U.S.S. 2547. These were prepared July 21, 1941. (A copy is available within the attached file.) The distance from the initial point to the crossing of the old trail is given as approximately 12 miles. Scaling this from the map would indicate the location being near to Latitude 63 degrees 12'N., Longitude 142 degrees 57'W.

\* \* \* \* \*

There is no question, then, that the point mentioned is located on the Tetlin [17-mile] Trail and not the Eagle Trail, and that all maps indicating otherwise are in error.

U.S. Exh. 0-72 at 5-6.

Ted Lowell, a friend of Hajdukovich since 1927, also testified as to the location of the old trail crossing. Lowell and Hajdukovich had discussed the boundaries of the reserve (Tr. 1320-24). According to the Judge, the most probative question asked during the testimony regarding parcel B was asked of Mr. Lowell:

Q. (By Ms. Miracle) Mr. Lowell, if John Hajdukovich had told you, I'll meet you at the Old Trail Crossing on the Tok River, where would that be?

A. The Old Trail?

Q. The Old Trail Crossing on the Tok River.

A. It would be right here.

Q. Would you please make an X with this purple pencil for me?

A. (Witness Complies).

(Tr. 1319-20; Decision at 26). The Judge stated in his decision:

Mr. Lowell placed the mark on State's Exhibit SA-18, a 1960 USGS 1:250,000 Limited Revisions 1978 map. The mark corresponds almost precisely with BLM's location of the Old Trail Crossing.

Of all the witnesses to testify on the western boundary, Mr. Lowell was the only one asked to indicate the crossing of the old Trail. Also, his close association with Hajdukovich prior to and during the creation of the reserve make his testimony impeccably reliable. Probably only Hajdukovich himself could better have shown where the crossing was located.

Decision at 26.

George Gustafson, townsite trustee for BLM, testified that in 1963, he and Hajdukovich traveled along the Glenn Highway to identify the southern boundary of the reserve, for the purpose of determining whether or not to issue timber cutting permits in that area. Gustafson related that Hajdukovich identified the boundary at a point somewhere between the bridge over the Tok River and the bridge over the Little Tok River. Gustafson also pointed out that he could not identify that point any more specifically than between the two bridges. He also stated that they were not attempting to identify the trail or trail crossing (Tr. 599-603; Decision at 25).

A 1956 memorandum by BLM mining engineer George Schmidt (BLM Exh. 0-68) indicates that Hajdukovich was "questioned closely" about the reserve boundary. According to Schmidt's memorandum Hajdukovich said the Tetlin boundary crossed the Alaska Highway near the Little Tok River Bridge. Questioned about the memorandum at the hearing, Schmidt stated he did not understand his own reference to the Little Tok River (Tr. 612).

On May 10 and June 28, 1962, cadastral engineer Donald E. Harding prepared special instructions for the survey of two groups of State land selections. The surveys were completed on June 16, 1964. According to the survey notes, Hajdukovich

physically made and showed Donald F. Harding, Cadastral Survey Officer, and Ray Harpin, Cadastral Surveyor, of the Fairbanks Land District, the ground position of the corner as intended in Executive Order No. 5365, dated June 10, 1930. It is accepted as the best available evidence of the position as described in the withdrawal.

(U.S. Exh. Q-6e at 8; Decision at 12).

The Judge's evaluation of the evidence on parcel B and his legal conclusions are as follows:

BLM and the State have asserted that the proper location of the trail crossing is located on a line some 12 miles from the starting point (BLM Ex. 0-72, p.10; 0-57, p. 2; AK Br. 45, 49). Their assertion is based primarily on the assumption that the penciled-in outline of the boundary as depicted on the 1922 USGS map is authentic and accurate, and secondarily on the 1941 survey instructions, the research and report of two historians, and the testimony of a variety of witnesses.

The court refuses to be bound by a patently inaccurate map. The testimony of some of the witnesses reflect major biases and were sometimes evasive and nonresponsive on major points and were rarely in accord. The court must take notice of matters not presented directly either at the hearings or in the briefs, although presented indirectly in the record through exhibits.

Apparently, neither party took the common sense approach to locating the old trail crossing although the method was discussed between BIA and BLM in 1962. It was suggested that a trip be made up the Tok River to ascertain the location of the trail crossing (Tetlin's Exh. HHH). That trip was never made. Instead, John Hajdukovich showed BLM cadastral surveyor Donald Harding the location of the crossing.

Yet Mr. Harding's testimony lacked certainty and conviction, and was contradictory at key times. When first asked if he had asked Hajdukovich where the boundary of the Tetlin reservation was located, he replied that he did not, rather he only asked where the old trail crossing was. Subsequently, after being asked whether he was "concerned" with where the boundary was located, he stated that he thought Hajdukovich had pointed out a spur up which the boundary was supposed to run, although three times Harding stated that he "couldn't swear to it." (Tr. 911-915).

When asked if he would have surveyed the trail crossing at the Eagle Trail had he been shown that point by Hajdukovich, Harding states he would not have, as the distance would have been too far from that specified in the 1941 instructions (Tr. 934-936). BLM surveyor Robert Pickering concurred (Tr. 1176-77). Thus both appeared to rely on Hajdukovich to the extent that his information reinforced the survey instructions.

The court finds the government's reliance on Hajdukovich's identification of the old trail crossing to be reasonable. Hajdukovich, if anyone, knew where the trail crossing was. He had drafted the original language of the reserve, and had been the moving force behind its creation. While the court recognizes that both Pickering and Harding stated they would not have accepted Hajdukovich's hypothetical identification of the Eagle Trail crossing, the court also realizes that a hypothetical question calls for a hypothetical response. The court relies on reality. In reality, Hajdukovich identified "the crossing of the old trail on Tok River" as the 17 mile Trail crossing. That location was properly surveyed by BLM.

\* \* \* \* \*

The court is convinced from evidence presented that Tetlin's assertion with regard to the location of the Old Trail Crossing is incorrect, and that BLM's interpretation of the call to that point is reasonable. Accordingly, the court finds the western boundary of the former reserve to be surveyed as described. The court realized that the call describing the "natural divide between tributaries of the Tetlin Lakes and the tributary to the Little Tok River" is ambiguous in that there is no natural divide between those tributaries immediately following the preceding call. However, BLM's line follows the natural divide -- the watershed -- above Tetlin Lake, and remains on that divide as it separates the tributaries of the Tetlin Lakes and the tributary of the Little Tok River.

The court does not find BLM's interpretation of the call describing that natural divide unreasonable. That ridge surrounding the Tetlin Lake basin would be obvious and readily discernible to Indians, trappers and traders alike in 1930.

\* \* \* \* \*

The court therefore finds that BLM surveyed the boundary of disputed Parcel B as it was described by Executive Order 5365. [Emphasis in original.]

Decision at 23-24, 26-27.

In support of its position that the evidence shows the Eagle trail crossing, not the 17-mile trail crossing, as the proper survey call, Tetlin cites the testimony of various witnesses and numerous documents of record.

First, Tetlin cites the testimony of several Natives as demonstrating their understanding of the location of the boundary. Chief Andrew Issac, for example, testified that the boundary "is supposed to be past the 17 mile to Tetlin \* \* \* down to the mouth of the Tok, this little Tok River" (Tr. 77). He also stated that there has been a "problem" for 100 years and "[s]ome of [the boundary] has changed quite a bit." *Id.* Asked where he thought the boundary was, Joe John testified that there was a trail crossing "at Tok" (Tr. 978). Titus David testified that the boundary "is near where the Little Tok and the Tok come together" (Tr. 108). Charlie James described it as "Porcupine Creek and up \* \* \* to Little Tok" (Tr. 129). Two other Natives also mentioned the Little Tok River (Tr. 146, 184). Tetlin also cites the testimony of George Gustafson, BLM townsite trustee; George Schmidt, a BLM mining engineer; and Everett Wilde, a school teacher at Tetlin between 1948 and 1952, as indicating that the Eagle trail crossing was the proper survey call.

The descriptions given by the Natives were not linked to on-location identification or to an original source authority. Of themselves they are quite vague and of little probative value. They do not rebut the several definitive revelations by Hajdukovich of the location of the crossing. The testimony of Schmidt, Gustafson, and Wilde also offer no greater support to Tetlin. Schmidt testified that he was confused about the location of the crossing (Tr. 62). <sup>3/</sup> Gustafson was unable to identify the location between the Tok and Little Tok Rivers (see excerpt from decision, supra). While Wilde testified that in the summer of 1950 he and several Natives posted signs along several points of the reserve boundary, these signs were posted on approximate points and no sign was posted at the mouth of the Little Tok River (Tr. 745-47).

Tetlin asserts that the Department shared Tetlin's understanding that the disputed boundary ran to the Eagle trail crossing. Tetlin refers to a 1948 memorandum (Tetlin Exh. U) in which the Director, BLM, advised the Regional Administrator, Anchorage, about a survey contemplated for lands

---

<sup>3/</sup> The Judge evaluated this portion of Schmidt's testimony as follows:

"Contrary testimony elicited by Tetlin tended to show that on several occasions, Hajdukovich had identified the Eagle Trail crossing as the one described in the Executive Order language, rather than the 17 Mile Trail. (Specifically, the testimony of George Schmidt. See supra, p. 12-13). As discussed, that testimony appears to be a case of misunderstanding on the part of the witness, rather than an inconsistent identification by Hajdukovich."  
Decision at 25.

withdrawn by EO No. 5365. In the memorandum, the Director described the first survey course as a

straight line from the mouth of Porcupine Creek to the old trail crossing of Tok River near the mouth of Little Tok River, a distance of about twenty-nine miles. A survey of this line would involve the running of random and true lines with the establishment of corner monuments at intervals of one-half mile.

An alternate description was also suggested in the same memorandum. In it, the Tok River would be substituted for the "straight line" to eliminate the need for survey of that line and to clarify other problems. In other memoranda cited by Tetlin (Exhs. BB, DD; BIA Exh. X-101), the uncertainty of the boundary, the need for survey, and the need to maintain constant the area of the reserve are acknowledged by BIA and BLM officials. <sup>4/</sup> Tetlin cites the testimony of Survey cartographer Taylor who acknowledged, but was unable to explain, the boundary dispute as depicted on inconsistent maps (Tr. 1107-1108).

These items of evidence, among many others referred to by Tetlin, illustrate the central dispute at the hearing. They demonstrate the lack of certainty of the western boundary, but contribute little to resolve it. One of the documents cited by Tetlin even favors BLM's position. In a 1957 memorandum (U.S. Exh. 0-69), the BLM Operations Supervisor, Anchorage, informed the BLM Area Administrator that:

Many years ago I discussed [establishing the boundaries] with John Hajdukovich who claims to have furnished the language for this Executive Order. He said the Bureau status map was wrong in that we presumed that the crossing of the Tok River was near a junction of the Tok and Little Tok Rivers. Hajdukovich says that the crossing is the old trail to Tetlin and is considerably north of where we have placed it on our status maps. If this were true, it would eliminate some of the current conflicts.

---

<sup>4/</sup> One example of these documents is BIA Exh. X-101, a June 20, 1961, memorandum from the Juneau Area Director to the BIA Commissioner. It states in part:

"For many years there has been a need to clearly define the boundaries of this reservation. No one knows today the location of the crossing of the old trail on the Tok River. As a result a number of non-natives have filed land entries with the Bureau of Land Management in Fairbanks, Alaska covering questionable areas near the Tok River. These difficulties may be eliminated by making use of the Tok River as a portion of the boundary for the reservation." The memorandum included a land description again suggesting an amended western boundary to include the Tok River. The purpose of the suggested change was to "clarify land entries which have already been filed with BLM." It was also stated that the western boundary would be ascertained without adverse effect on the rights of Natives.

The evidence persuades us that 17-mile trail is the proper survey call and that the Judge's exclusion of parcel B from the reserve on that basis was proper.

After a careful review of the record we conclude that as of December 18, 1971, the reserve was described to the exclusion of parcels B and D. As noted above, the northeastern boundary of the reserve which serves not only to define but to exclude parcel D was surveyed and that survey was approved in 1967 and 1970. Moreover, the western boundary which serves not only to define but to exclude parcel B was originally surveyed in 1962 with the assistance of John Hajdukovich, who had originally proposed and participated in the drafting of the description of the reserve. See C. Michael Brown, *Indians, Traders and Bureaucrats in the Upper Tanana District: A History of the Tetlin Reserve* (1984) at 256-59, 266-67. In connection with this survey, Hajdukovich had located the disputed old trail crossing mentioned in the description of the reserve in EO No. 5365. Id. at 257. In its June 1982 decision, ANCAB concluded that the "1962 survey depicted the Reserve boundary as BLM now delineates it." Tetlin Native Corp., 7 ANCAB at 146, 89 I.D. at 309. See BLM Exh. M-4. In addition, a BLM realty specialist testified that the official BLM records, i.e., survey plats and protraction diagrams, depicting the reserve as of December 18, 1971, would not have included parcels B and D within the reserve (Tr. 1141-42). Indeed, at the time Tetlin elected to take the reserve under section 19 of ANCSA, parcels B and D were depicted on the official map of the reserve, upon which the Board of Directors of Tetlin relied in making the election, only as penciled additions thereto (Tr. 184-85).

In any case, at the time Congress enacted section 1437(b)(3) of ANILCA, and Tetlin exercised its section 1437(a) election, all of the boundaries of the reserve had been finally surveyed. The extent of the legislative conveyance was, thus, known to Congress when it enacted ANILCA, and was known by Tetlin when it exercised its option. Tetlin must be deemed to have agreed to a complete satisfaction of its entitlement under section 19 of ANCSA, by electing to take title to the land then described in Survey No. 2547. 5/ Tetlin elected to receive a conveyance of the Indian Reserve, as Survey No. 2547 encompassed the reserve as it "existed on December 18, 1971." Tetlin should have elected not to proceed under ANILCA, if it wanted to dispute the extent of the reserve.

---

5/ The record indicates that parcels B and D may contain land selected by and tentatively approved to the State and patented land, totalling 32,649 acres. The Department does not have jurisdiction to effect disposition of the patented land or the land tentatively approved to the State, where in the latter instance section 906(c)(1) of ANILCA, 43 U.S.C. § 1635(c)(1) (1982), operated as an immediate legislative conveyance of title effective as of the date of tentative approval. State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331 (1984). The ANILCA conveyance to Tetlin, on the other hand, took effect "on the date of filing of [the] document of election" (43 U.S.C. § 1641(c) (1982)), i.e., May 18, 1981.



Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified in part and reversed in part.

Gail M. Frazier  
Administrative Judge

We concur:

Bruce R. Harris  
Administrative Judge

James L. Burski  
Administrative Judge